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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 279

GRANT E. RIO,
Petitioner,

vs.

THE STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Petitioner, Grant E. Rio, prays that a writ of certiorari issue to review the opinion and decision of the Supreme Court of the State of Washington entered April 19th, 1951, in Case No. 31492, wherein petitioner is defendant and appellant and The State of Washington is plaintiff and respondent (R. 41-51) and the order of the Supreme Court of the State of Washington entered June 8th, 1951, denying petitioner's Petition for a Re-hearing. (R. 79.)

OPINIONS BELOW

The opinion (R. 41-51) of the Supreme Court of the State of Washington is reported in 138 Wash. Dec. 423, Advance Sheet No. 11, May 2nd, 1951, and in 230 P(2d) 308, Advance Sheet 1, May 18 1951. The order denying petitioner's Petition for Re-hearing (R. 79) is reported in 138 Wash. Dec. 767, Advance Sheet No. 18, June 20th, 1951.

JURISDICTION

Judgment and sentence (R. 8-10) of the Superior Court of the State of Washington for Whitman County was made and entered June 20th, 1950, and notice of appeal (R. 10) to the Supreme Court of the State of Washington was orally given in open court and served and filed in writing on said 20th day of June, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) and Rule 12(1), paragraph 3 of the Revised Rules of this Court.

The federal questions, to-wit, denial of due process of law guaranteed by the XIV Amendment to the Constitution of the United States and of the right of trial by an impartial jury guaranteed by the VI Amendment to the Constitution of the United States was first raised in the Petition for Re-hearing in the Washington State Supreme Court (R. 52-78), which

federal questions were considered by the Washington Supreme Court in passing on the Petition for Rehearing, as indicated by the Certificate of Chief Justice E. W. Schwellenbach (R. 80) and determined adversely to petitioner by the Order Denying the Petition for Re-hearing (R. 79).

QUESTIONS PRESENTED

I.

In the trial of a case upon Information charging murder in the first degree, punishable by death, *has the defendant been deprived of due process of law guaranteed by the XIV Amendment of the United State Constitution* when in the trial *the trial court refused to permit expert testimony of psychiatrists and neurologists as to defendant's sanity, notwithstanding the fact that defendant had pleaded not guilty by reason of insanity at the time of the commission of the alleged crime* (R. 41), and *such action on the part of the trial court was affirmed by the appellate court of the state,* in effect establishing a precedent by the Supreme Court ruling that notwithstanding substantial evidence the trial court *did not commit error in removing from the consideration of the jury the evidence and facts supporting defendant's theory of the defense* and substituting therefor his own judgment?

II.

In a case in which the defendant is tried on Information charging murder in the first degree, punishable by death, has the defendant been deprived of his *fundamental right to trial by jury guaranteed by the VI Amendment of the Constitution of the United States* by the action of a trial judge in giving an Instruction to the jury that *the question of the sanity or insanity of the defendant at the time of the commission of the alleged crime was not for the consideration of the jury* when there was substantial evidence of psychiatrists and of lay witnesses to the effect that the defendant *did not know right from wrong, could formulate no intent or purpose, and had mental disorders prior to and subsequent to the alleged crime,* and such action on the part of the trial court in removing the consideration of the defendant's plea of not guilty by reason of insanity *is affirmed by the appellate court,* not withstanding the fact that *the Opinion of the Supreme Court indicates that while there was some evidence of mental irresponsibility and insanity, nevertheless the trial court could substitute his judgment for the judgment and consideration of the jury* and invade the province of the jury?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes, Section 2174, Rem. Rev. Stat. (Wash), reading as follows:

> "When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, or his counsel, or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane and mentally responsible between the time of the commission of the crime and the time of the trial. The plea may be interposed at any time thereafter, before the submission of the cause to the jury, if it is proven that the insanity or mental irresponsibility of the defendant at the time of the crime was not before known to any person authorized to interpose the plea."

and,

Section 6930, Rem. Rev. Stat. (Wash.), provides:

"The superior court of any county in this state, or the judge thereof, upon the application of any person under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, shall cause such person to be brought before him, and he shall summon to appear at the same time and place two or more witnesses, who shall testify, under oath, as to conversations, manners and general conduct upon which said charge of insanity is based; and shall also cause to appear before him, at the time and place, two reputable physicians, before whom the judge shall examine the charges, *unless the accused, or anyone in his or her behalf, shall demand a jury to decide upon the question of insanity. If such demand is made the trial shall be by jury.* * * *"

Section 3, Article 1, of the Washington State Constitution provides:

"No person shall be deprived of life, liberty, or property without due process of law."

and,

Section 21, Article 1, of the Washington State Constitution provides:

"The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts

not of record, and for a verdict of nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

and,

Section 22 of Article 1 of the Washington State Constitution provides:

"In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial *by an impartial jury of the county in which the offense is alleged to have been committed,* and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

Amendment VI to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the state and district wherein the crime shall have been committed,* which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Amendment XIV to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty or property, without due process of law,* nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

January 20th, 1950, an Information (R. 1-2) was filed in the Superior Court of the State of Washington in and for Whitman County, charging the petitioner, as defendant, of two Counts of murder in the First Degree, in Count I with the murder of Joe Roberg and in Count II the murder of James Beckner, both of which murders were alleged to have been

committed on December 31st, 1949. February 3rd, 1950, your petitioner was arraigned on said Information and entered general pleas of not guilty as to each count (R. 2-5) and special pleas of not guilty by reason of insanity (R. 2-5), under the provisions of Section 2174, Rem. Rev. Stat. (Wash.) above quoted.

On the issues so framed the cause came on for trial before a jury in the Superior Court of the State of Washington in and for Whitman County on March 22nd, 1950, and on April 1st, 1950, the jury returned its verdict of guilty as to each count (R. 5) and recommended the imposition of the death penalty (R. 6).

On the trial of the case, in support of his plea of not guilty by reason of insanity or mental irresponsibility at the time of the commission of the alleged crimes, the defendant, petitioner herein, offered the testimony of Alfred J. Martin (R. 11-13) that he was a taxicab driver and the afternoon preceding the commission of the alleged murders he transported petitioner from the city of Spokane, Washington, to the James Beckner farm, near Riparia, Washington, a distance of some one hundred twenty miles, and upon arriving at the Beckner farm the petitioner in a conversation with James Beckner, in the presence of the witness, requested James Beckner to take him

to the veteran's hospital because "he said he had mind trouble" (R. 11) and on further examination the witness, Alfred J. Martin, testified: (R. 12)

> "Q. On the way down from Spokane and while riding in the taxicab did Mr. Rio say anything to you about having any mental troubles?
>
> A. Yes, that was approximately the time he emptied the first fifth of whiskey.
>
> Q. What did he say?
>
> A. He said he had trouble with his head at times and should have an examination. He said he didn't feel like himself at different times and that he would get out of hand with himself.
>
> Q. What did he mean by that?
>
> A. He had no control of himself."

Beverly Geiger, a witness for the defendant, petitioner herein, testified (R. 13-15) she visited the defendant in the Whitman county jail on January 1st, 1950, the day following the alleged crime, and at that time the defendant had no recollection of what had happened and had the delusion that a water pipe in his cell was a gas pipe and that "I think they have been letting gas in here ever since I have been here." She further testified that his eyes looked "just wild."

Edward J. Kromery, a witness for the defendant, testified (R. 15) he had known the defendant for some time before the alleged crime and the defendant had related to him that on one occasion while he was driving from Spokane to the place he worked "he was driving along the road and he saw men on each side along the fence. He looked over there and then there would be another one on this side, like twins; he said he kept driving faster and faster and they stayed all the way until he got back to work." He further testified that on two separate occasions he had observed the defendant when he completely "blacked out" and did not know where he was, and later was unable to say where he had been.

Eugene P. Campbell, a witness for defendant, testified (R. 16-18) he visited the defendant in jail, either the 5th or 6th of January, 1950, five or six days after the alleged crime, and at that time, after H. Earl Davis in the presence of the witness, told the defendant that he was entitled to have his attorney present when officers or others talked about the crime the defendant made the statement that "it wouldn't make any difference whether I talk or not the way I see it, I believe if I just keep my mouth shut and say nothing that it will come out of my nose and they will know what I am thinking" and he further said

"if it don't come out of my nose, it will come out of my ears and they will hear it that way." He further said "there is a screen in the cell and that when I think anything the thought is reflected in that screen."

Dr. John M. Lambert, a witness for the defendant, (R. 18 to 40) qualified as an expert specializing in psychiatry and neurology and testified that on February 10th, 1950, he made a complete psychiatric and neurological examination of the defendant, petitioner herein, and after stating his findings on such examiation, stated his conclusion in the following language (R. 20):

> "A. My conclusion was that this man due to his excessive drinking, which I felt could be substantiated, had an acute toxic psychosis at the time of the murders. He was incapable of formulating any plan; he was unable to adhere to the right or refrain from the wrong."

The prosecution moved to strike from the foregoing answer the words "he was unable to adhere to the right or refrain from the wrong" and after a lengthy *voir dire* examination of the witness, in the absence of the jury, the trial judge ruled out all of the testimony, and in instructing the jury gave Instruction No. 31 (R. 41) reading as follows:

"Under the evidence in this case you are instructed that as a matter of law the question of insanity is not for the consideration of the jury, and there is no issue to be decided by the jury in this case in relation thereto."

By the action of the trial judge in refusing to permit the witness Dr. John M. Lambert to give his testimony and to express his conclusions from his findings resulting from the psychiatric and neurological examination of the defendant, petitioner herein, and instructing the jury as above set out in Instruction No. 31, your petitioner believes in the face of the substantial and competent evidence, the trial court invaded the province of the jury in deciding as a matter of fact there was no issue of insanity in the case, and deprived your petitioner not only of his right "to a speedy and public trial by an impartial jury, guaranteed by Amendment VI of the Constitution of the United States, but also his rights guaranteed under Amendment XIV of the Constitution of the United States reading in part as follows: "nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

SPECIFICATIONS OF ERROR

I.

The trial court committed error, affirmed by the Supreme Court in denying and refusing to permit the jury to pass upon the testimony of lay and expert witnesses, particularly the testimony of Dr. John M. Lambert (R. 18-41), and withdrawing from the jury the question of fact supported by substantial and competent evidence as to defendant's insanity at the time of the commission of the alleged crime, in violation of the defendant's fundamental and constitutional right of a speedy trial by impartial jury guaranteed by the VI Amendment of the Constitution of the United States.

II.

The defendant was deprived of his fundamental right guaranteed by the Constitution of the United States of due process of law, first by the action of the trial court in refusing to permit the testimony of expert and lay witnesses to go to the jury for consideration and substituting his judgment for the judgment of the jury as to the factual situation, and second by the Supreme Court affirming the action of the trial court, notwithstanding the fact the Opinion of the Supreme Court indicates there was not only

inference of but evidence to indicate mental irresponsibility and insanity.

III.

The defendant was deprived of a fair and impartial trial by the introduction of the Prosecuting Attorney in the closing argument of rape as a motive for the crime when there had been no Information filed as to rape and not a scintilla of evidence introduced by the Prosecution in connection with said charge, and there was positive undisputed evidence that there was no motive for the crime, and such action was affirmed by the Supreme Court of the state.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

It is of great importance, not only to this petitioner but to every person accused, indicted or informed against for a crime that this court review the decision of the Supreme Court of the State of Washington (R. 41-51) for the reason that in and by that decision the Washington State Supreme Court ratified, approved and affirmed the action of the trial court in refusing to accept and submit to the jury competent and qualified evidence and testimony applicable to your petitioner's defense of not guilty of the crimes of murder as charged in the information

(R. 1-2) by reason of insanity (R. 2-4) and in instructing the jury by its Instruction No. 31 (R. 41) that:

> "Under the evidence in this case you are instructed that as a matter of law the question of insanity is not for the consideration of the jury, and there is no issue to be decided by the jury in this case in relation thereto."

by which action the trial court invaded the province of the jury to decide questions of fact, and deprived your petitioner of his right to a speedy and public trial by an impartial jury of the state and district wherein the crime was committed, which right is guaranteed by Amendment VI of the Constitution of the United States, and further deprived your petitioner of his rights guaranteed under the Fourteenth Amendment of the Constitution of the United States that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Under Section 6930, Rem. Rev. Statues of the State of Washington, quoted in full under the heading "STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED" (supra) it is provided where a charge of insanity is made against a person

the Superior Court of any county of the state shall examine witnesses and two reputable physicians "unless the accused, or anyone in his or her behalf, *shall demand a jury to decide upon the question of insanity.* If such demand is made the trial *shall* be by jury."

Under Section 2174, Rem. Rev. Statutes of Washington, quoted in full under the heading "STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED" (supra) the defense of insanity or mental irresponsibility by or on behalf of a person charged with a crime may be interposed and if established is a legitimate defense.

On the trial of your petitioner in the state court there was offered in his behalf competent and qualified evidence from the witness Dr. John M. Lambert (R. 18-20) detailing his findings as an expert in the practice of Neuro-Psychiatry, from which he reached the conclusion (R. 20) that:

> "My conclusion was that this man (petitioner) due to his excessive drinking, which I felt could be substantiated, had *an acute toxic psychosis at the time of the murders.* He was *incapable of formulating any plans;* he was *unable to adhere to the right and refrain from the wrong.*"

and after a lengthy argument and *voir dire* examin-

ation of the witness in the absence of the jury the witness stated (R. 21) with reference to the word "psychosis" that:

> "Psychosis is insanity or mental disease. Psychosis is a manifest mental split between the image and the real."

In addition to the expert testimony of Dr. Lambert, there was testimony of Alfred J. Martin (R. 11-13), Beverly Geiger (R. 15), and Eugene P. Campbell (16-18) describing the appearance, actions, delusions and hallucinations of your petitioner the day previous and within a few days following the alleged crimes, from all of which the minds of reasonable men might differ as to the question of whether or not your petitioner, at the time of the commission of the alleged crimes, was sane or insane, or mentally responsible or mentally irresponsible, which made an issue of fact for the determination by the jury, but nevertheless the trial court withdrew the issue of fact from the jury and substituted his own judgment for the judgment of the jury, thereby depriving your petitioner of his constitutional right to a trial by an impartial jury and denying him his constitutional right to due process of law and equal protection of the law.

The rule is laid down in 53 Am. Jur. 183 (Trial Sec. 214) that:

> "An issue of insanity arising either in a civil action or as a defense in the prosecution of one accused of crime is ordinarily one of fact to be determined by the jury under adequate instructions from the court, in the light of all of the facts and circumstances introduced in the evidence. *It is for the jury and not the court to determine the weight of conflicting evidence on questions of insanity, or to draw inferences of sanity or insanity where the evidence although not conflicting is reasonably susceptible to different conclusions in this regard. This is true of either expert or nonexpert testimony.*

In the case of *In Re Ellern*, 23 Wn. (2d) 219, 160 P. (2d) 639, it was held that where a trial court conducted an insanity hearing without a jury, when a proper jury demand has been made under Section 6930, Rem. Rev. Stat. (Wash.) quoted in full under the heading "STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED" (supra) and determines the insanity of the person charged, that there was such an irregularity as to warrant setting the adjudication aside.

The arbitrary action of the trial court in the face of competent and qualified evidence upon which the

minds of reasonable men might differ, and from which the jury in this case, if permitted to pass upon the facts, might have determined that at the time of the commission of the alleged crimes your petitioner was "incapable of formulating any plan; he was unable to adhere to the right and refrain from the wrong" (R. 20) was an invasion by the trial court of the province of the jury and denied your petitioner the right to a trial by an impartial jury guaranteed him by the Sixth Amendment of the Constitution and deprived him of due process of law and equal protection of the law guaranteed him by the Fourteenth Amendment of the Constitution.

In the case of *Mooney v. Holohan,* 294 U. S. 103, 79 L. ed. 55 S. Ct. 340, 98 A.L.R. 406, this court had under consideration the question of whether or not Mooney had been deprived of his constitutional guarantee of due process on his trial in the state court, this court said:

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation *through the action of the state,* embodies the fundamental conceptions of justice which lie at the

base of our civil and political institutions. *Herbert v. Louisiana,* 272 U. S. 312, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial in which truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be purjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of the prosecuting officers on behalf of the State, like that of administrative officers in the execution of the laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a state "whether through its legislature, *through its courts,* or through its executive or administrative officers. Carter v. Texas, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 S. Ct. 687; Rogers v. Alabama, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 S. Ct. 257; Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 233, 234, 41 L ed. 979, 983, 984, 17 S. Ct. 581."

In the case of *Lee v. Baltimore Hotel Co.* (Mo.), 136 S. W. (2d) 695, 127 A.L.R. 711, the court said:

> "The right of trial by jury guaranteed by our Constitution, if it be worth anything, must mean, as this court has said, 'right to a fair and impartial jury.'"

In *Wilkey v. State* (Ala.), 192 So. 588, the court said:

> "We conclude the matter with the observation that due process is guaranteed by the Constitution and the statutes. Constitution of 1901 #11, Code of 1923, Sec. 8593, 8594, 9498. The organic law and the statutes guarantee, in a proper case, *that the parties* have a trial by jury, that a party may be heard in his own proper person and by competent and material evidence duly introduced and by the representations of his counsel."

For all of the reasons herein set forth it is respectfully submitted that a writ of certiorari should issue herein to review the proceedings in the Superior Court of the State of Washington, in and for Whitman County, and the Supreme Court of the State of Washington in Case No. 31492 of that court. It is further respectfully submitted and most earnestly urged that the Decision of the Supreme Court of the State of Washington, in affirming the errors committed by the trial court as herein set forth, is, by reason of our system of authority by case law, not only vitally important to each and every citizen of

the State of Washington, but to each and every citizen and individual within the jurisdiction of any state of the union and the United States for the reason that the Opinion and Decision of the Supreme Court of the State of Washington establishes a precedent and relaxes the mantle of protection thrown about the person accused of a crime by, in effect, depriving such person of the fundamental right of trial by jury.

The defendant and petitioner herein most respectfully submits that a writ of certiorari to review the proceedings of the Supreme Court of the State of Washington be issued upon the following grounds:

1. The action of the trial judge in refusing to permit the defendant herein to offer evidence to the jury supporting his defense of not guilty by reason of insanity deprived the defendant of the right to trial by an impartial jury guaranteed him by the *VI Amendment to the Constitution of the United States.*

2. The action of the trial judge in withdrawing from the consideration of the jury the defendant's defense of not guilty by reason of insanity deprived the defendant of due process of law and equal protection of the laws guaranteed by the *XIV Amendment to the Constitution of the United States.*

3. The action of the Supreme Court of the State of Washington in upholding and affirming the action of the trial court as herein set forth deprived defendant of his fundamental rights guaranteed by the *VI Amendment to the Constitution of the United States and the XIV Amendment to the Constitution of the United States.*

WHEREFORE the defendant respectfully prays that a writ of certiorari issue herein and that he be granted such relief as is guaranteed to him by the Constitution of the United States and by substantial and fundamental justice.

Respectfully submitted,

DALE D. DRAIN,
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H. EARL DAVIS,
Of Counsel.

OCT 3 1951
CHARLES ELMORE CROPLEY
CLERK

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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SUPREME COURT OF THE UNITED STATES

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Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Respondent prays that the petition of Grant E. Rio for a Writ of Certiorari to review the decision of the Supreme Court of the State of Washington, in Case No. 31492 of said Court (R. 41-51), and the order of said Court denying a rehearing (R. 79) be denied for the reasons hereinafter set forth.

Opinions Below

The trial court was affirmed by the Washington State Supreme Court in 138 Wash. Dec. 423, 230 P. (2d) 308.

A rehearing was denied in 138 Wash. Dec. 767.

Statement of Grounds of Jurisdiction

Petitioner attempts to invoke the jurisdiction of this Court under Title 28 U. S. C. Sec. 1257 (3) and Rule 12 (1), Par. 3 of the Revised Rules of this Court to hear a constitu-

tional question first mentioned in his petition for rehearing in the Washington State Supreme Court (R. 52-78). The constitutional question, if any, was mentioned in ground III of the petition for rehearing (R. 58, 68-77) incidental to argument as to the sufficiency of the evidence of insanity to go to the jury. In attempting to raise the question the petitioner stated therein (R. 68, 69) (italics ours):

> "It is respectfully contended that the appellant, having pleaded mental irresponsibility and insanity, and *having produced some evidence of such condition,* the trial court could not remove this defense from the consideration of the jury and substitute his judgment as to the facts in place of the jury's finding. * * *, the appellant has been deprived of due process of law guaranteed not only by the State of Washington but the Constitution of the United States, and it is contended he is being deprived of his liberty and his life without due process of law, *because there was sufficient evidence to establish a prima facie case of mental disease and* and mental irresponsibility * * *".

The trial court ruled that under the evidence there was no question of insanity for the consideration of the jury (R. 41). The Washington State Supreme Court found and so stated in its opinion (R. 49):

> "The record shows that the appellant did not make a prima facie defense of insanity."

An order denying the petition for rehearing was made and entered June 8, 1951 (R. 79), in which the only statement as to the decision is:

> "The court having considered the appellant's petition for a rehearing herein,
> It is ordered that the petition for a rehearing be and it is hereby denied."

The certificate of the State Supreme Court as to the existence of a Federal question states (R. 80):

> "* * * it became material to the determination of such Petition for Re-Hearing in this court to determine said questions so made by the appellant, which were considered and determined adversely to the appellant, as appears from the order denying such Petition for Re-Hearing entered in this court June 8th, 1951."

Nothing else appears in the record to show the way in which the Federal question or questions were passed upon by the State Supreme Court. For all that appears the State Court may have merely decided after due consideration that no Federal question was involved.

Respondent's Statement of Questions Presented

I

Is a Federal question involved where, upon a defense of insanity, both the trial court and the State Supreme Court ruled, upon an adequate non-Federal ground, that petitioner did not make a prima facie case of insanity to go to the jury, and the alleged Federal question was first raised upon petition for rehearing incidental to petitioner's contention that there was sufficient evidence of insanity to take the case to the jury?

II

Under the record in this case, has the defendant been deprived of due process of law under the Fourteenth Amendment to the United States Constitution or to a right to trial by jury under the Sixth Amendment of said Constitution where it was held by the trial court and affirmed by the Washington State Supreme Court that, under the evidence of the case and the laws of the State of Washington, there was actually no evidence of legal insanity offered or

admitted and, consequently, no issue of insanity for the consideration of the jury; and where no question was or is now raised that the laws of the State of Washington in that regard are unconstitutional?

Statutes Involved

Rem. Rev. Stat., Sec. 2173:

> "Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this act. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act."

Rem. Rev. Stat., Sec. 2258:

> "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent."

Statement

On April 1, 1950, petitioner was found guilty of two counts of first degree murder in the killing of Joe Roberge and James Beckner on December 31, 1949. On appeal to the Washington State Supreme Court, the case was affirmed (138 Wash. Dec. 423, 230 P. (2d) 308). The defendant had entered a special plea of insanity (R. 2-4).

The record before this court as to whether there was in fact evidence of insanity is very incomplete (R. 11-41). The Washington State Supreme Court in the rendering of its decision had the benefit of the entire statement of facts,

consisting of more than 500 pages (R. 41). Both the trial court (R. 41) and the State Supreme Court found against petitioner upon the question of whether there was any evidence of insanity under the laws of the State of Washington. Upon that question the Washington State Supreme Court held, in a unanimous opinion of the five Judges hearing the case, as follows (R. 47-51) (italics ours):

> "It is appellant's position that he was insane and mentally irresponsible at the time of the commission of the crime, notwithstanding his condition of mind was voluntarily produced by intoxicating liquor and was temporary in nature.
>
> There are two statutes that have a bearing upon the law of insanity and mental irresponsibility as a defense for the commission of crime. One is Rem. Rev. Stat., Sec. 2173, which provides as follows:
>
> 'Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this act. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act.'
>
> Insanity and mental irresponsibility, as used in the statute, have been construed as meaning the same thing, State v. Schneider, 158 Wash. 504, 291 Pac. 1093. This condition of mind, under the terms of the statute, is not available as a defense if it was 'induced by voluntary act of a person charged with a crime.' The record is conclusive that appellant's condition of mind was produced by intoxicating liquor.
>
> The other statute in point is Rem. Rev. Stat., Sec. 2258, which provides as follows:
>
> 'No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or

degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent.'

It may be noted in passing that the appellant was given the full benefit of the above statute in that evidence of his intoxication and state of mind were admitted in evidence, and the jury was properly instructed as to the effect they could give it on the question of appellant's intent in committing the crime.

The appellant's theory of the law is that his excessive use of alcohol had produced a toxic psychosis, which rendered him unable to distinguish between right and wrong. This is the test to which this state adheres when the defense of insanity is interposed. State v. Craig, 52 Wash. 66, 100 Pac. 167; State v. Schafer, 156 Wash. 240, 286 Pac. 833; and State v. Maish, 29 Wn. (2d), 185 P. (2d) 486.

Toxic psychosis can be produced by causes other than intoxicating liquor, though appellant's witnesses showed it was so produced in this instance. Medically speaking, toxic psychosis is not the exact equivalent of drunkenness. Appellant, therefore, contends he had the right to prove, by medical and lay witnesses, that he was unable to distinguish right from wrong at the time of the killing, and that the court should have instructed the jury that such a state of mind was a defense to the crime. He asserts that it was error not to submit the issue of mental irresponsibility due to toxic psychosis to the jury. He contends that the court had no right to pass upon the quesion of whether he had made a prima face case of mental irresponsibility as a matter of law, but was required to submit his theory of the case by reason of his special plea, even if the evidence was slight, or incredible.

Commenting upon this latter contention of appellant, we think he misconstrues the citations he marshalls in support thereof. The court is not required to submit instructions to the jury upon every theory requested by a defendant. It is true the court will not pass upon the weight or credibility of the appellant's evidence, but assuming that it is all true, he still must make a prima

facie case as a matter of law to entitle him to instructions upon the theory.

As was said in State v. Woods, 163 Wash. 224, 1 P. (2d) 219,

'Appellant is not entitled, as she contends, to have instructions upon her theory of the case, unless the instructions are justified by the evidence adduced. Nor will a reversal be directed because of the refusal to give an instruction, unless it is strictly and entirely the law applicable to the facts, hence the court did not err in refusing to give same.'

And in State v. Huey, 14 Wn. (2d) 387, 128 P. (2d) 314,

"* * * appellant was not entitled to have submitted to the jury, for any purpose, the question of his claimed mental irresponsibility at the time of the alleged act.'

The record shows that the appellant did not make a prima facie defense of insanity. He relies upon the medical testimony of Dr. Lambert, an eminent psychiatrist, who examined him ten days after the offense. In the absence of the jury, the witness was freely permitted to testify as to his examination and conclusions, so that the court could determine if his evidence should be admitted before the jury.

There is considerable of this evidence that could be quoted, but it may be fairly summarized in the conclusion that, at the time of the offense, the appellant could not form a criminal intent or distinguish right from wrong by reason of a mental condition, which the doctor designated as toxic psychosis. He distinguished this from drunkenness, though, in this instance, it was conclusively determined that it was caused by a drunken spree. His testimony was unequivocal that, upon his examination of the appellant ten days later, at a time when the effects of the alcohol had worn off, he found nothing wrong with appellant's nervous system or mentality. It is true there was some academic testimony with regard to edema, which we gather is a permanent injury to the brain and nervous system caused by the excessive use of alcohol. We accept the

medical conclusion of the doctor that permanent insanity can be produced by the protracted and excessive use of alcohol as a medical fact, but find it has no significance as to the law in the instant case.

The appellant, while conceding that drunkenness is not a defense, contends that this medical fact brings him under the purview of State v. Miller, 177 Wash. 442, 32 P. (2d) 535, which cites, with approval, 16 C. J. 109, Par. 86, as follows:

> 'Temporary insanity, that is to say, the mental excitement or frenzy produced by immoderate drinking, does not exempt from responsibility where the accused voluntarily became intoxicated, although by statute in some states it may be considered in mitigation of the penalty. This is merely another way of stating the general rule that voluntary drunkenness is no excuse. On the other hand, however, long continued habits of intemperance producing permanent mental disease amounting to insanity, or so weakening and impairing the mind that one committing an offense has not mind enough at the time to know right from wrong, relieves him from responsibility under the law, the same as insanity arising from other causes.'

The rule of State v. Miller, supra, goes no farther than to hold that, if a permanent insanity is produced by intoxicating liquor, such insanity is an excuse. Obviously, to be classed as permanent, the insanity must remain after the intoxication has worn off. Appellant's testimony did not show this condition to exist in the instant case.

This brings him within the rule of State v. Huey, 14 Wn. (2d) 387, 128 P. (2d) 314, wherein we said:

> 'In the instant case, so far as this record shows, appellant was normal, or at least there was nothing to indicate he was insane or mentally irresponsible, before or after the date of the alleged act. If he was mentally irresponsible at the time of the act charged in the information, such condition of his mind was

induced solely by voluntary intoxication. This being true, and the crime charged not involving the element of intent, appellant was not entitled to have submitted to the jury, for any purpose, the question of his claimed mental irresponsibility at the time of the alleged act.'

In the instant case, there is no complaint as to the instruction given on intent as affected by intoxication. We think the trial court was right in refusing appellant's requested instructions on insanity, and in excluding the testimony on the medical theory of toxic psychosis.

We do not agree with appellant's theory of the law upon which his assignments of error are predicated. Accordingly, we find the court did not err as appellant contends.

The judgment is affirmed.''

Thereafter a petition for rehearing was filed with the Washington State Supreme Court, in which for the first time an alleged Federal question was mentioned (R. 52-78). It was there mentioned incidental to argument upon the sufficiency of the evidence of insanity to go to the jury (R. 68-76).

Reasons for Denying the Writ and Argument

a. *Federal Question*

While the certificate of the State Court as to the existence of a Federal question states that it became material to determine the questions (R. 80), nevertheless, it nowhere appears in the record as to the way in which any Federal question was passed upon by the court, as required by Rule 12 (1) of this court's rules, which states:

''If the appeal is from a State Court, the statements shall in addition specify * * * the manner in which, the Federal questions sought to be reviewed were

> raised; * * * and the way in which they were passed upon by the court; * * *".

Furthermore, it nowhere appears in the record that the decision of the State Supreme Court (R. 41-51), or its denial of a rehearing (R. 79), was made to rest upon a decision of any Federal question, or that any Federal question was in itself real, substantial, and necessary to the court's decision. On the contrary, the decision of the State Court is firmly based upon a decision of state law to the effect that no temporary mental condition arising from the voluntary drinking of intoxicating liquor can amount to insanity and that such evidence is not evidence of insanity to be submitted to the jury (R. 47-51). Neither the order denying the petition for rehearing (R. 79), nor the certificate as to a Federal question involved (R. 80), placed the decision of the State Supreme Court upon any other basis or upon the decision of any real, substantial, or necessary Federal question.

That the opinion of the Washington State Supreme Court (R. 41-51) was based upon a decision of state law is clearly shown. Rem. Rev. Stat. (Wash.), Sec. 2173, is quoted as stating (R. 47):

> "No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act."

In addition the State Court in its opinion (R. 50) quoted from *State* v. *Miller*, 177 Wash. 442, 32 P. (2d) 535, and *State* v. *Huey*, 14 Wn. (2d) 387, 128 P. (2d) 314, to the effect that no temporary mental condition arising from voluntary drunkenness amounts to legal insanity under the laws of the State of Washington.

That the Supreme Court found from the evidence that the alleged mental condition of the defendant, if any, arose from

voluntary drunkenness is clearly shown by the following statements from the opinion:

> "The record is conclusive that appellant's condition of mind was produced by intoxicating liquor" (R. 47).
>
> "Toxic psychosis can be produced by causes other than intoxicating liquor, though appellant's witnesses showed it was so produced in this instance" (R. 48).
>
> "We accept the medical conclusion of the doctor that permanent insanity can be produced by the protracted and excessive use of alcohol as a medical fact, but find it has no significance as to the law in the instant case" (R. 49).
>
> "Obviously, to be classed as permanent, the insanity must remain after the intoxication has worn off. Appellant's testimony did not show this condition to exist in the instant case" (R. 50).

Speaking concerning the testimony of Doctor Lambert as to toxic psychosis, the court stated (R. 49):

> "He distinguished this from drunkenness, though, in this instance, it was conclusively determined that it was caused by a drunken spree."

Finding that the petitioner's mental condition, if any, as shown by the evidence conclusively arose from voluntary drunkenness, the court concluded that there was no evidence of insanity in the case under the laws of the State of Washington, and that the case was within the rule laid down in *State* v. *Huey*, 14 Wn. (2d) 387, 128 P. (2d) 314, *supra*, wherein it is stated (R. 49):

> "* * * appellant was not entitled to have submitted to the jury, for any purpose, the question of his claimed mental irresponsibility at the time of the alleged act."

It is the general rule that the decision of a State Court upon a question of state law is ordinarily binding upon the

Federal Courts and will not be reviewed. It is so stated in Simkins Federal Practice, Revised Edition, Sec. 337.

It, therefore, follows that no real or substantial Federal question necessary to the decision of the State Supreme Court has been raised. The case is well within the following rules set forth in an annotation found in 84 L. Ed. 925, in which numerous authorities are cited in support of the rules laid down:

> "It is settled that in order to justify the United States Supreme Court in reviewing the judgment or decree of a State Court, the record must show that the judgment rested upon the disposition of a Federal question" (P. 940).
>
> "Jurisdiction cannot be founded upon a mere surmise that the decision of a State Court turned upon a Federal question" (P. 940).
>
> "It must, therefore, appear from the record, affirmatively or by fair implication, that the decision of the Federal question was necessary to the determination of the cause" (P. 940).
>
> "It follows that the United States Supreme Court will not review a judgment or decree of a State Court if the record shows that it was or may have been rendered upon a ground which did not involve a Federal question and which was sufficient to sustain it" (P. 941).
>
> "Nor is it enough that it should appear that in point of fact the State Court in its opinion passed upon a Federal question which was sought to be raised by the plaintiff as the foundation of his case if it further appears that before reaching that question the State Court had already decided that the action of the plaintiff could not be sustained according to the meaning of the provisions of the state statute under which it was brought, as the latter is not a Federal question" (P. 941).
>
> "This rule that the United States Supreme Court will not review the judgment or decree of a State Court where the record shows that it was or may have been

rendered upon a sufficient ground which did not involve a Federal question applies to cases involving both Federal and non-Federal questions, not only where the record discloses that the State Court rested its judgment upon both grounds, but also where it was not clear which of them was relied upon, provided in both cases, that the non-Federal ground was sufficient in itself to sustain the judgment" (P. 942).

"It might be added that it must also appear that the alleged Federal question is real and substantial" (P. 926).

It is stated in Simkins Federal Practice, Revised Edition, Sec. 1073, as to the matter of a Federal question:

> "Where the State Court decision rests on an adequate non-Federal ground the Supreme Court has no jurisdiction of the case."

Moreover, since petitioner is not attacking any law of the State of Washington, relied upon by the State Court, as being contrary to the United States Constitution, the issue is really one primarily of fact to be determined from the record as to whether or not there was any evidence of insanity to go to the jury. The trial court held there was no such actual evidence for submission to the jury (R. 41) and the State Supreme Court affirmed that decision (R. 47-51).

Thus two courts have passed upon the sufficiency of the evidence of insanity to go to the jury and the matter appears to be within the rule of the case of *Texas & N. O. Co.* v. *Brotherhood of R. & S. Clerks,* 281 U. S. 548, 74 L. Ed. 1034. It is there stated at page 1040 of the L. Ed.:

> "On the questions of fact both courts below decided against petitioners. Under the well established rule, this court accepts the findings in which two courts concur, unless clear error is shown."

It has also been stated in *Page* v. *Arkansas Natural Gas Corp.*, 286 U. S. 269, 76 L. Ed. 1096, at page 1098 in the L. Ed.:

> "Many and conflicting questions of fact are involved here, but as they have been found in favor of respondent by both courts below, we do not review them * * * ".

In applying for a Writ of Certiorari the petitioner is asking that this court go over the testimony gone over by both the trial court and the Washington Supreme Court to determine whether or not there is any evidence of insanity sufficient to make a prima facie case for the jury, aside from evidence of a temporary mental condition arising from the voluntary drinking of intoxicating liquor. The trial court had the advantage of seeing and hearing the witnesses. The State Supreme Court had a full and complete record of the testimony before it and yet it was the unanimous opinion of all five Judges of that court that the evidence was "conclusive" that petitioner's mental condition "was caused by a drunken spree" (R. 49).

It is submitted that this court is primarily concerned with the law rather than the searching of voluminous statements of fact to determine whether or not within the state law, as determined by the State Court, there was any evidence introduced as to a particular allegation of fact.

> "It must really and substantially involve a controversy the determination of which depends on the construction of the Federal law. It must be a question of law as stated by the plaintiff in his complaint, and not one arising from the facts appearing at the trial" (Simkins Federal Practice, Rev. Ed., Sec. 449).

b. *Evidence of Insanity*

However, if this court is inclined to review the evidence itself, it is apparent from even the partial record of the testimony now before the court that there is no evidence of

insanity under the law of the State of Washington. The Washington State Supreme Court held that as a matter of state law temporary insanity arising from voluntary drunkenness does not constitute evidence of insanity as a defense to crime (R. 47, 50). The state law in that regard is not here being attacked as unconstitutional.

There are many references in the testimony to the effect that the petitioner had been drinking and that his alleged temporary mental condition was due to a drinking spree in spite of the omission from the record of much that was unfavorable to him. It is stated in the defendant's special plea of insanity that (R. 4):

> "* * * for approximately two weeks prior to the time alleged in said Information the defendant had indulged in the constant excessive use of such intoxicating liquors to such an extent and for such length of time as to result in weakening and deranging the mind of the said Grant E. Rio * * *".

The witness Martin testified (R. 12):

> "Q. On the way down from Spokane and while riding in the taxicab did Mr. Rio say anything to you about having any mental troubles?
>
> A. Yes, that was approximately at the time he emptied the first fifth of whiskey."

Doctor Lambert, an expert witness for the defense, made numerous such statements:

> "A. Well, at the time I examined this patient on February 10th I found this man to be in excellent physical condition; there was nothing wrong with the central nervous system; on February 10th he showed no evidence of any mental disease" (R. 20).
>
> * * * * * * *
>
> "A. My conclusion was that this man due to his excessive drinking, which I felt could be substantiated,

had an acute toxic psychosis at the time of the murders" (R. 20).

* * * * * * *

"A. What I mean, this man had acute toxicosis which was caused by alcohol" (R. 21).

* * * * * * *

"Q. Are you prepared at this time to say because of this excessive drinking the accused at the date in question was not capable of distinguishing between right and wrong?

A. Yes sir.

Q. And that was based upon the use of alcohol?

A. Yes sir" (R. 22).

* * * * * * *

"Q. Well, toxic psychosis.

A. Its usually of a temporary nature. It leaves as soon as the toxic disturbance is removed.

Q. You are saying it is temporary in that case?

A. Yes sir.

Q. Well now, as I understand psychosis is something you cannot cure?

A. No sir.

Q. Can you cure it?

A. Yes sir" (R. 23).

* * * * * * *

"Q. I mean the patient recovered from the acute toxic psychosis due to alcohol in this case.

A. Yes.

Q. His recovery was due to the fact that alcohol was withdrawn from him so to speak.

A. Yes" (R. 23).

* * * * * * *

"A. At the time I examined him I found absolutely nothing wrong with him.

Q. Now from your examination what information did

you obtain from him at the time of your examination as to what he had been doing just prior to the crime?

A. He said he had been drinking heavily'' (R. 31).

* * * * * * *

''A. Well the condition that was caused by his drinking or consuming large amounts of alcohol persisted for approximately five days after he entered the jail.

Q. Now what was it that led you to the conclusion that it persisted for five days after he was taken to jail?

A. The information given me by the patient.

Q. All right. What was that information?

A. His first night in jail he was very confused. The second night he started hearing voices calling him derogatory names, the voices also accused him of killing people, told him he was going crazy, losing his mind, and so forth. He related he had been shifted from cell to cell for some reason. He stated he had ruined bedding and blankets, and so forth. Then he stated he confessed on the second day to Mr. Hickman he felt he had killed 31 people and also asked that he be hung. On the third day he was still confused and he stated at that time he saw all over bodies of dead people resembling dead Japs that he had seen on Okinawa. Then he said something to the effect people were trying to decide whether to hang him or stone him to death. Later he was removed to a cell where there was a broken window where he secured a piece of glass and tried to cut his wrists and throat, and after that things cleared up rapidly'' (R. 32).

* * * * * * *

''A. For one thing a person who goes on an acute alcoholic spree has a good deal of gas irritation, he will vomit back his food, and another point is they are drinking so heavily they never even consider eating. Does that answer your question?

Q. To some extent yes. You think that is true in this case?

A. I believe so'' (R. 36).

* * * * * * *

"A. * * * the edema.
Q. It wouldn't have occurred without the drinking.
A. Right" (R. 37).

It should be noted that the jury was fully instructed as to the effect of intoxication upon the question of intent (R. 48). It should also be noted that the testimony of Martin, Geiger and Campbell, relied upon by petitioner in his statement of the case, relates to that period of time within which Doctor Lambert testified the defendant was under the effects of intoxicating liquor (R. 32).

The testimony of the witnesses Mathiason and Kromrey (R. 15) relates to incidents far removed from the time of the crime itself and is insufficient to make any prima facie showing of insanity at the time of the crime.

c. *Discretion of the Court*

Rule 38, Paragraph 5, of the Revised Rules of this Court, provides:

> "A Review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

This is not a case where the court should exercise its discretion in favor of the petitioner. Since the law applied by the Washington trial and Supreme Courts is not questioned, the questions raised must ultimately be decided by a search of the evidence to determine whether or not there was any evidence of insanity. It, therefore, follows that there is in this case no question of National importance or that will give rise to any decision upon a Federal question needing clarification.

The entire record of the testimony is not before the court and it is not to be assumed that the trial court and the five

Judges of the State Supreme Court did so unanimously err upon a question as to whether there was any actual evidence of insanity where, as here, it is apparent that the law applied as to what constitutes insanity under state law is not being questioned in this court. Moreover, the State Supreme Court in its decision speaks of the record being "conclusive" (R. 47) and that the mental condition "conclusively" (R. 49) arose from a drunken spree.

d. *Answer to Petitioner's Argument*

Petitioner quotes from Rem. Rev. Stat. (Wash.), Sec. 6930, to the effect that where a charge of insanity is made against a person that he may demand a jury, and where demand is made, he shall be so tried. To contend that that statute is applicable here is so clearly baseless as to indicate the petitioner's whole purpose in seeking a writ in this court is but to delay and obstruct justice. That statute as presently constituted was passed by the Washington State Legislature in Chapter 72 of the Session Laws of the State of Washington for 1947, under the title "Commitment of Insane Persons". It is intended to apply only to commitment proceedings to an institution for the insane.

Section 6930, quoted by petitioner, states (italics ours):

> "The Superior Court * * * *upon the application of any person under oath*, setting forth that any person, by reason of insanity, is unsafe to be at large shall cause such person to be brought before him * * * The judge shall *examine the charges*, unless the accused, * * * shall demand a jury to decide upon the question of insanity."

The petitioner was not charged with insanity by anyone. The record discloses no such charge. It is nowhere argued that there was such a charge; that he was insane at the time of trial; or that he should have been committed as an insane

person. The defendant was tried for murder, not insanity. To the charge of murder he entered a special plea of insanity as a defense (R. 4). On the issue of insanity he had the burden of proof and failing to establish a prima facie case, a question of insanity was not submitted to the jury (R. 41). The case of *State* v. *Hartley,* 25 Wn. (2d) 211, at page 222, enumerates the following principles:

> "The issue of insanity, or mental irresponsibility, was raised by the appellant in his plea and imposed upon him the burden of proving that defense by a preponderance of the evidence." Citing authorities.
>
> "An accused person is presumed to be sane and to have been sane at the time the crime was alleged to have been committed; this presumption exists at the beginning of the trial and continues throughout the case until the contrary is shown by the evidence." Citing authorities.
>
> "A plea of insanity does not itself constitute proof of the alleged mental condition, and the presumption of sanity therefore prevails until insanity is established by the degree of proof required."

The balance of petitioner's argument is principally concerned with argument that there was evidence of insanity, which question has already been discussed under "b. Evidence of Insanity", at pages 17 to 20, inclusive, herein.

Petitioner has not deemed that his third assignment of error with respect to the argument to the jury is of sufficient merit to argue and respondent, therefore, makes no argument thereon.

c. *Conclusion*

In conclusion, it is respectfully submitted that the Petition for Writ of Certiorari be denied for the reasons that:

1. No real and substantial Federal question necessary to the decision of the State Court was raised.

2. The decisions of both State Courts rest upon adequate grounds of state law.

3. That the state law upon which the decisions of both State Courts rest is not being questioned in this court as being contrary to the Constitution.

4. That on the facts both State Courts were correct that under the laws of the State of Washington, as to what constitutes legal insanity as a defense to a criminal action, there was in fact no evidence of insanity to be submitted to the jury.

5. That this is not a case for the court to exercise its discretion in favor of petitioner.

WHEREFORE, Respondent respectfully prays that the application for Writ of Certiorari be denied.

Respectfully submitted,

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